Stanton, K. (2016). Defining the duty of care for bank references: Playboy Club London Ltd v Banca Nazionale del Lavoro SPA. *Tottel's Journal of Professional Negligence*, *32*(4), 272-275.

Defining the duty of care for bank references

Playboy Club London Limited v Banca Nazionale del Lavoro SPA

[2016] EWCA Civ 457
Court of Appeal (Civil Division)
Laws, Longmore, David Richards LJJ
18th May 2016

It is an indictment of the law of tort that over fifty years after the House of Lords decided *Hedley Byrne v Heller* the principles underlying that decision and thus the tortious part of professional negligence liability remain shrouded in doubt. The decision of the Court of Appeal in *Playboy Club London Limited v Banca Nazionale del Lavoro SPA*[1] provides a good example of this. In its result, the case is in line with many modern decisions in the area. But, its reasoning leaves much to be desired.

The facts of the case related to a positive bank reference given by the defendant bank relating to one of its customers. The reference was given to Burlington Street Services Ltd. In fact it was required by the claimants (Playboy Club) in connection with the customer gambling at its casino. The claimant's practice was to route references through Burlington as a way of preserving the customer's confidentiality in relation to gaming activities. There was little doubt that the reference was given negligently. It asserted that the customer was 'financially healthy, and capable to meet his business commitments and all his obligations' (sic) and that he was 'trustworthy up to the extent of 1,600,000.00 one million six hundred thousand sterling pounds in any one week.' In fact the customer had only just opened an account with the bank at the time that the reference was given and no funds were ever deposited into it. In reliance on the reference the club granted the customer a cheque cashing facility which permitted him to obtain gambling chips in exchange for cheques which were yet to be cashed and to commence to gamble at the club. Cheques were issued under this facility (they were written on photocopied cheque slips and the first instance judge regarded them as 'counterfeit') in exchange for chips. However, when the cheques were presented by the claimant, they were returned by the defendant unpaid. The claimant was left with a loss of £802,940 and sought to recover this on the grounds that the reference had been given negligently and that they had relied upon it. The case therefore presented the classic *Hedley Byrne* problem scenario of whether a negligent statement made to one person but damaging a third party to whom it had been forwarded could give rise to a duty of care owed to the third party.[2] At first instance the judge, HHJ Mackie QC, had held that: a duty of care was owed on these facts to the club; that that duty had been breached and that causation was established. He held the club to have been 15% contributorily negligent because of the suspicious appearance of the cheques.

The Court of Appeal decision

On appeal the bank argued that its only duty of care on the facts was owed to Burlington and that the fact that the club had consciously concealed its interest in the matter was fatal to its claim. This argument potentially conflicts with the decision in *Hedley Byrne* itself. In that case a bank sought a reference from the defendant bank on behalf of a client whose name and interest in the information was not disclosed. However, Lords Reid and Morris both denied that the duty of care could be limited to exclude that client given that the bank was clearly seeking the information on behalf of a unnamed client and not in its own interests. However, this was not conclusive on the facts of *Playboy* because the requesting bank had actually named Burlington as the client on whose

1 [2016] EWCA Civ 457.

2 Issues concerning whether there was a duty in relation to 'counterfeit' cheques, causation and contributory negligence were argued but did not need to be resolved.

behalf it was acting. By being explicit, it had apparently removed any suggestion that an unnamed client would be the recipient of the information.

Longmore LJ gave the leading judgment in the Court of Appeal. He followed a conventional technique in recognising that there are a variety of recognised approaches to establishing a Hedley Byrne duty of care which are likely to lead to the same result and that it is therefore appropriate to make recourse to: the question of assumption of responsibility; the *Caparo* three fold test and to consider whether incremental development from existing authority justifies the recognition of a duty of care. Citing a passage from Lord Hoffmann's speech in *Customs and Excise Commissioners v Barclays Bank Plc*[3] he distinguished the facts of this case from those of *Hedley Byrne* by arguing that the critical question was whether the defendant had 'assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for the one purpose (rather than another).' On this basis he accepted the defendant's argument that the identification of Burlington as the recipient of the information excluded the claimant from the ambit of the duty of care which was owed. This approach also defeated an argument based on the claimant being an undisclosed principal, especially as the reference has been marked as given 'In strict confidential' (sic). To meet a possible argument that the assumption of responsibility test cannot always be decisive the judge bolstered his decision by arguing (surely correctly) that it was not 'fair, just and reasonable' for a claimant who had consciously concealed its identity from an adviser to be owed a duty of care by that person.

As a result of this finding that no duty of care was owed, the other issues did not strictly arise for decision. Nonetheless, Longmore LJ indicated that he would have held that the scope of the representation only extended to the customer's general creditworthiness and that the chain of causation had not been broken by acceptance of the 'counterfeit' cheques. He expressed no view on the finding of contributory negligence.

David Richards and Laws LJJ agreed with Longmore LJ's approach without adding any views of their own.

Comment

There are several comments that can be made about this reasoning whilst not arguing that the result is incorrect.

As will be obvious, Playboy is another example of the Court of Appeal approaching a *Hedley Byrne* case by adopting the technique of considering all of the possible tests with the aim of showing that whichever is correct they all lead to the same result. While this approach may make the result appeal proof, it is scarcely conducive to principled development of the law. This criticism can be developed in a number of ways.

First, the reasoning is another example of the continued reliance on the assumption of responsibility approach that one hoped had been buried by the decision in *Customs and Excise Commissioners v Barclays Bank Plc*[4]. The resort to this vague, and meaningless, formula provides no assistance to those who need to know whether a duty of care is likely to be recognised in relation to a negligent statement. It is far more helpful to make an attempt to unpack the factual matrix which underlies the decisions which have been reached on this subject and to plot a way forward on the basis of what is found.[5]

---

3 [2007] 1 A.C. 181 at para 35.

4 [2007] 1 A.C. 181 at para 35.

5 The author has attempted to develop such arguments previously in KM Stanton *Hedley Byrne v Heller: the relationship factor,* (2007) 23 PN 94.

That criticism is accentuated by the reliance on the *Caparo* three fold test[6] and its recourse to the ultimate vague test of whether it is 'fair, just and reasonable' to impose a duty of care on the particular facts. That test is appropriate when there is no existing duty of care category applying to the facts before the court: it is not appropriate to use it when a recognised duty of care applies and the court is simply attempting to refine it. In *Playboy* the Court of Appeal was dealing with facts which fell squarely within the *Hedley Byrne v Heller* duty. It is far more sensible, on the facts of the case, to have an open debate about the knowledge which a person making a statement needs to have of the recipient and the use to which the information will be put than to fall back on the vagueness of 'fair, just and reasonable' (and, for that matter, assumption of responsibility). Indeed, approaching the matter in this way raises the possibility of inconsistent results.

What is particularly problematic is that Lords Bridge and Oliver specifically pointed the way forward in their speeches in *Caparo*.

Lord Bridge summarised the logic of the line of cases following from *Hedley Byrne* as follows:

> 'The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation.'[7]

Lord Oliver spoke in similar terms:

> 'What can be deduced from the *Hedley Byrne* case, therefore, is that the necessary relationship between the maker of a statement or giver of advice ('the adviser') and the recipient who acts in reliance upon it ('the advisee') may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment.'[8]

Based on these approaches which turn the existence of a duty of care not on foreseeability but on a tighter criterion of knowledge, the result in *Playboy* seems correct. The true recipient of the advice was not identified to the bank, neither was the use to which the advice was to be put.

I would not seek to argue that these statements in *Caparo* are necessarily the last words that need to be said on this subject. Indeed there has been little discussion in subsequent cases of Lord Bridge's notion of 'indirect' communication or of what Lord Oliver meant by an 'ascertainable class' of recipient. I would certainly wish to argue that there may be cases where an unidentifiable recipient has interests which are so clearly affected by the advice that a duty of care should be owed. Indeed, as we have seen,

---

6 The test laid down by Lord Bridge in *Caparo Industries Plc. v Dickman* [1990] 2 A.C. 605 at 617-618.

7 [1990] 2 AC 605 at 620-1

8 Ibid at 638

Hedley Byrne was such a case. However, surely the law would be being developed in a positive way if appellate courts were overtly discussing the degree of identification needed before a duty of care can arise rather than hiding that issue behind a smokescreen of meaningless jargon.

Keith Stanton
School of Law, University of Bristol